—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1902.

CITY OF JOPLIN, *Appellant,*

vs.

SOUTHWEST MISSOURI LIGHT COMPANY, *Respondent.*

No. 295.

Statement of Case, Brief and Argument for the Appellant.

STATEMENT OF CASE.

This is a proceeding instituted in the Circuit Court of the United States for the Western District of Missouri by way of a bill in equity in the name of the Southwest Missouri Light Company against the City of Joplin, to enjoin the latter from supplying or furnishing to the inhabitants of the City of Joplin incandescent lights or other electric lighting as was being done by it at the time of the institution of this action.

THE BILL OF COMPLAINT.

The amended bill of complaint (Record 3-9) contains substantially the following allegations:

The City of Joplin on October 7th, 1891, passed municipal ordinance No. 441, a copy of which is set forth in the brief *infra*, granting to John C. Cox, Jr., H. H. Gregg, J. V. Pierce, John Wise, J. W. Freeman and Charles Ragin, partners doing business under the name of the Merchants' Electric Light & Motor Company and to their successors and assigns, the right, power, privilege and authority within said city to build, erect, maintain, construct and operate all necessary and convenient electric light and motor plant apparatus, machinery and appliances for the generation of electricity; to provide, erect and maintain proper and adequate conduits and means for the distribution, application and use of such electricity for the purpose of furnishing light, heat, motor power and for other purposes for the period of twenty years from the granting of the franchise, and the said J. C. Cox, Jr., and his associates were authorized and invested with the full power to erect and maintain on, over and under the streets, alleys, avenues, lanes and public grounds of the City of Joplin, poles, masts and other proper supports and to carry, suspend and string wires thereon and therefrom, and to lay down within such streets, avenues, alleys and lanes beneath the surface thereof such proper pipes, wires or conduits as might be necessary or convenient for the purposes aforesaid, and to maintain and operate, repair and renew the same as might be necessary or convenient, and to occupy the streets, avenues, alleys and lanes of the city as might be necessary.

It is also provided in said ordinance that the said John C. Cox, Jr., and his associates should not charge for electric arc lights furnished by them more than the following sum per month, viz: For 10 o'clock circuit, not to exceed the sum of $8.00 per light; for 12 o'clock circuit, not to exceed the sum of $10.00 per light; for all night circuit, not to exceed the sum of $12.00 per light; for incandescent lights, for 16 C. P., for 10 o'clock circuit, not to exceed the sum of 90c., and for all night circuit not to exceed the sum of $1.00 per light.

It was further provided in said ordinance that said John C. Cox, Jr., and his associates should maintain and keep in order, without charge to the City of Joplin, one light so erected on the front porch of Freeman's Foundry in the City of Joplin so as to light the Frisco crossing thereat in said city. It was further provided in said ordinance that said John C. Cox, Jr., and his associatee should, within ten days from and after the date of the passage of said ordinance, file with the City Clerk of the City of Joplin their written acceptance of the rights and privileges granted by said ordinance and subject to the conditions therein imposed. And that unless John C. Cox, Jr., and his associates should begin work in good faith within sixty days from the approval of said ordinance and have work in operation within four months, the ordinance should be void and of no effect, and that the said John C. Cox and his associates should further agree to pay for the publication of said ordinance, and upon their refusal so to do, then the ordinance should be deemed null and void.

It is further alleged in the bill of complaint that the said John C. Cox, Jr., and others did within

the time prescribed in said ordinance file their written acceptance of the same as required by it, and did pay for the publication of the ordinance, and did begin work contemplated by the ordinance within sixty days from its approval, and did have the work in operation within four months from the time of the approval of the ordinance, and did fully comply on their part with all the obligations, covenants and conditions imposed upon them by said ordinance No. 441, aforesaid.

It was further alleged that the work performed by the said John C. Cox, Jr., and his associates, under the said ordinance consisted in the construction of an electric motor plant, the erection of poles and wires strung thereon along the streets of the City of Joplin, together with all necessary and suitable equipment and appliances for conducting and operating the business of furnishing motor power and light to the City of Joplin and the citizens thereof, and additions thereto; that the power plant, equipments and appliances for furnishing such light and power, together with the subsequent repairs and improvements of the same, were procured, erected and constructed by the said Cox and his associates and their grantees at the expense of $15,000 or thereabouts.

On June 7, 1892, the Merchants Light & Motor Company was duly incorporated pursuant to the laws of the State of Missouri, and as a body corporate it thereupon succeeded to and became the owner of the motor plant, poles, wires, equipment, appliances and other property theretofore owned, including the franchises and privileges granted by said ordinance No. 441, to said John C. Cox, Jr., and his associates, and the said Merchants Light & Motor Company operated and conducted its electric motor

and light plant and business aforesaid until the sale and transfer thereof to the complainant as hereinafter stated.

Thereafter, on December 28, 1895, this complainant was duly incorporated under the laws of the State of Missouri, with full power to operate electric and gas works and appliances to furnish light and power to the City of Joplin, to the inhabitants thereof and its vicinity. Thereafter, on June 9, 1896, by its bill of sale duly executed, the Merchants Electric Light & Motor Company did, in consideration of the sum of $15,000, paid to it by the complainant, sell, assign and deliver to this complainant the poles, lines and other equipment, appliances and property of Merchants Electric Light & Motor Company, hereinbefore referred to, including the franchise granted by said ordinance No. 441, and complainant became the assignee and owner thereof, and complainant did thereupon enter into possession of said property, equipment and appliances, and has since said time been conducting and furnishing, under said franchise so assigned to it, the business of furnishing electric lights to the inhabitants of the City of Joplin.

It is further alleged that the defendant City of Joplin has constructed an electric light plant to be owned, controlled and operated by said city, and has not only erected arc lights on the streets of said city and is therewith furnishing its streets and alleys with arc electric lighting, but said city, by its mayor and council and other officers, has also erected poles along the streets and alleys of said city, and has strung the same with wires, and has purchased transformers, and has established a schedule of rates and prices and solicits patrons and customers, and has since February 23, 1900, last past, and is still

doing ordinary commercial electric lighting in said city and the additions thereto, and is thereby entering into competition with the complainant in the matter of supplying and furnishing for pay to the inhabitants of said city and its additions incandescent lights or other electric lighting for the residences, places of business and like places, and is thereby depriving the complainant of rentals, income and profits in the matter of supplying said inhabitants aforesaid with electric lighting under the franchise above mentioned.

It is further alleged that the acts and proceedings of the defendant and its officers and servants in erecting its own electric light plant, in furnishing and supplying its inhabitants with incandescent or other electric lights and otherwise entering into competition with complainant in the matter of doing ordinary commercial electric lighting in the said city of Joplin and its additions, have been done and purport to have been done under the authority of two-thirds votes of the electors of said city, authorizing the increase of its municipal indebtedness for the purpose of erecting said electric light plant and also under and pursuant to ordinances of said city, duly passed by its council and approved by its mayor.

It is further stated that the complainant has invested a large amount of capital in the business of furnishing and supplying to the inhabitants of the City of Joplin and its vicinity electric lighting and electric motor power under the franchises before mentioned and assigned to it; that the franchise is a valuable one and that its value and the value of the complainant's property used in connection therewith will be greatly impaired and perhaps wholly destroyed if the City of Joplin is permitted to continue

its competition with the complainant in supplying and furnishing to the inhabitants and residents of defendant electric lighting and to thereby deprive the complainant of rentals, profits, incomes and sources of revenue it would otherwise receive from the citizens and inhabitants of Joplin in its business of furnishing and supplying to them electric lighting under its said franchise heretofore mentioned; that great pecuniary damage, loss and hardship is thereby being inflicted and will continue to be inflicted upon the complainant; that the complainant is the owner of real and personal property situated in the City of Joplin and assessed by it for municipal taxation, and that by reason thereof the complainant, unless relief is accorded to it, will be compelled, through such taxation on its said property, to aid and assist in operating and maintaining defendant's electric plant and business as a rival and competing one with the complainant's own electric plant and business, all of which will be highly inequitable and unjust and in violation of the complainant's rights in the premises.

It is further alleged that the conduct and acts of the defendant in so entering into competition as aforesaid with the complainant in the matter of supplying and furnishing the citizens of defendant and its vicinity electric lighting as hereinbefore mentioned, violates and sets at naught, to the complainant's great injury and damage, the clause of the Constitution of the United States (contained in Article I, section 10, of said instrument) which provides that no state shall pass any law impairing the obligation of contracts, and also violates the further provision of the Constitution of the United States, contained in Article 14, Section 1, thereof, which provides that no state shall deprive any person of property without due process of law.

The complainant further states that it is without adequate remedy at law to prevent the wrongs and injuries to it contemplated and threatened by defendant, and that the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs.

The prayer of the bill is for a temporary injunction restraining and enjoining the defendant, its officers, agents and servants, from supplying or furnishing to the inhabitants of the City of Joplin, or of additions thereto, incandescent lights or other electric lighting, and for an assessment of damages for whatever wrongs and injuries the complainant has suffered by reason of the defendant's acts and conduct and for further relief.

THE ANSWER.

The defendant admits that on October 7, 1891, ordinance No. 441 was duly passed and approved and that it granted to John C. Cox, Jr., and his associates under the name and style of the Merchants Electric Light & Motor Company, their successors and assigns, the right, power, privilege and authority within the City of Joplin and such additions as might be made thereto, to build, erect, maintain, construct and operate all necessary and convenient electric light and electric motor plants, apparatus, machinery and appliances for the generation of electricity; to provide, erect and maintain proper and adequate conduits and means for the distribution, application and use of such electricity for the purpose of furnishing heat, light, motor power and for other purposes for the period of twenty years from the granting of the franchise, and for that purpose John C. Cox, Jr., and his associates were given the

right, power, privilege and authority within the City of Joplin and such additions as might be made thereto, to build, erect, maintain, construct and operate all necessary and convenient electric light and electric motor plants, apparatus, machinery and appliances for the generation of electricity; to provide, erect and maintain proper and adequate conduits and means for the distribution, application and use of such electricity for the purpose of furnishing light, heat, motor power and for other purposes for the period of twenty years from the granting of said franchise, and the said John C. Cox, Jr., and his associates were by said ordinance authorized and invested with the full power to erect and maintain on, over and under the streets, avenues, alleys, lanes and public grounds of the City of Joplin, poles, masts and other proper supports, and to carry, suspend and string wires thereon and therefrom, and to lay down within such streets, avenues, alleys and lanes, beneath the surface thereof, such property, pipes, wires or conduits as might be necessary or convenient for the purposes aforesaid, and to maintain and operate, repair and renew the same, as might be necessary or convenient, and to occupy the streets, avenues, alleys and lanes of said city as the same might be necessary.

It is further admitted that it was also provided in said ordinauce that the said J. C. Cox, Jr., and his associates should not charge for electric arc lights furnished by them more than the following sum per month, viz: For 10 o'clock circuit, not to exceed the sum of $8.00 per light; for 12 o'clock circuit, not to exceed the sum of $10.00 per light; for all night circuit, not to exceed the sum of $12.00 per light; for incandescent lights, of 16 C. P., for 10 o'clock circuit, not to exceed the sum of 90c, and for

all night circuit, not to exceed the sum of $1.00 per light.

The defendant further admitted that it was also provided in said ordinance that said John C. Cox, Jr., and his associates therein mentioned, should maintain and keep in order, without charge to the City of Joplin, one light erected on the front porch of Freeman's foundry in said city of Joplin, so as to light the Frisco crossing thereat in said city.

The defendant further admitted that it was provided in said ordinance that J. C. Cox, Jr., and his associates, should within ten days from and after the passage of said ordinance file with the city clerk of the City of Joplin, their written acceptance of the rights and privileges granted by said ordinance and subject to the conditions therein imposed.

The defendant further admitted that it was likewise provided in said order that unless the said J. C. Cox, Jr., and his associates, should begin work withix sixty days from the approval of said ordinance and have work in operation within four months, then said ordinance No. 441 should be void and of no effect. And it was further provided that said John C. Cox, Jr., and his associates, should further agree to pay for the publication of said city ordinance upon presentation of the bill for same and that upon their refusal to pay said bill or cost of publication, then said ordinance should be deemed null and void, until such conditions were complied with.

It is further admitted by defendant that the said John C. Cox, Jr., and his associates, doing business under the firm name and style of the Merchants Electric Light & Motor Company, did, within the time prescribed in said ordinance, file their writ-

ten acceptance of the same with the clerk of said said City of Joplin, subject to all the conditions imposed and contained in said ordinance, but as to whether the said J. C. Cox, Jr., and his associates did pay for the publication of said ordinance, as therein provided, or did begin the work contemplated by said ordinance within sixty days from its approval, or did have said work in operation within four months from the time of the approval of said ordinance, or did fully comply on their part with all the obligations, covenants and conditions imposed upon them by said ordinance, the defendant had not sufficient information on which to base a belief and therefore denied the same and the defendant alleged that immediately after the purchase of an undivided five-sixths interest in said franchise granted by ordinance No. 441, as hereinbefore stated, by complainant, to-wit, June 9th, 1896, the complainant repudiated said franchise and refused in any manner to comply with or be bound by the conditions imposed by it.

Defendant further admitted that the work performed by the said J. C. Cox, Jr., and his associates under said ordinance consisted in the construction of electric light motor plant, the erection of poles with wires strung thereon along the streets of the City of Joplin, together with all necessary and suitable equipments and appliances for conducting and operating the business of furnishing motive power and lights to the City of Joplin and the citizens thereof and additions thereto, and admits that said power plant, equipments and appliances for furnishing said light and motive power, together with the subsequent repairs and improvements of the same, were procured, erected and constructed by the grantees of said franchise at an expense to them of about $14,-

000; that the said electric light plant erected in the City of Joplin by the Merchants Electric Light & Motor Company, under the provisions of said ordinance No. 441, consisted of: One brick building about 25x100 feet, ground dimensions, and the ground on which it stood, of the value of about $3,000; one pole, line and incandescent dynamo, purchased of the Joplin Gas & Coke Co., of the value of about $2,000; one large combination arc and incandescent dynamo, of the value of $2,000; one 35-arc light dynamo, of the value of $1,000; one 150 H. P. Corliss engine and one 150 H. P. stationary tubular boiler, of the value of $3,000; extension pole line, $2,000; arc lamps, electric fans and materials, of the value of about $1,000.

The defendant alleged that the complainant did not purchase or become the owner of all of said plant, but only purchased the pole line and extension, of the value of about $4,000; the large combination arc and incandescent dynamo, of the value of about $1,000, also arc lamps, electric fans and materials, of the value of about $1,000; that the complainant did not purchase or become the owner of the building or ground, neither did it become the owner of said boiler or engine, but that said electric light plant was dismantled immediately after said sale, and the said building, grounds, boiler and engine were conveyed to other parties and ceased to be a part of said electric light plant; that immediately after the purchase of said part of said plant by the complainant, the said pole line was dug up and taken away and the wires were torn down and removed from said line; that the large arc and incandescent dynamo was removed from said plant and sent to Port Arthur, Texas, and the 35-arc dynamo was taken by complainant out of the City of

Joplin and out of Jasper county; and defendant alleged that since the year 1896 there has not been kept or maintained within said city or additions thereto the electric light plant or any part thereof erected under the provisions of said ordinance No. 441, nor has there been any electric light plant maintained in said city, nor in any addition thereto, by complainant since said time.

The defendant further alleged that John C. Cox, Jr., and his associates were required by the provisions of ordinance No. 441, to at all times keep and maintain within the City of Joplin, or within the additions thereto, an electric light and power plant sufficient at all times to supply the reasonable demand for public and commercial lighting within said city and additions.

It was further admitted that on or about June 2, 1892, the Merchants Light & Motor Company was duly incorporated pursuant to the laws of the State of Missouri, and that said body corporate thereupon succeeded to and became the owner of the motor plant, poles, equipments, appliances and other property hereinbefore mentioned, owned and held by said Merchants Light & Motor Company at the time of and prior to its incorporation aforesaid, including an undivided five-sixths interest of the franchise and privilege granted by said ordinance No. 441, to John C. Cox, Jr., and his associates, and that complainant as such successor operated and conducted its said motor light plant and business aforesaid until the sale and transfer of part of the same to the complainant as heretofore stated.

The defendant admits that on December 28, 1895, the complainant was duly incorporated under laws of the State of Missouri, with full power being conferred upon it by its charter to operate electric

and gas works and appliances to furnish light and power to the City of Joplin and the inhabitants thereof and its vicinity.

The defendant further admits that on June 9, 1896, by its bill of sale duly executed, the Merchants Electric Light & Motor Company did, in consideration of the sum of $15,000, paid to it by the complainant, sell, assign and deliver to complainant a part of the property of said electric light and motor company, as above stated, including an undivided five-sixths interest in the franchise granted by the said ordinance No. 441 of defendant therein to John C. Cox, Jr., and his associates, and the defendant has been informed and believes that an undivided one-sixth interest in said franchise was never assigned to complainant, but is now owned by J. V. Pierce, and defendant has been informed and believes that before the assignment by the Merchants Electric Light & Motor Company to complainant, and whilst said Merchants Electric Light & Motor Company was operating under the provisions of the franchise granted by said ordinance No. 441, said Merchants Electric Light & Motor Company entered into contract with various parties, but that after the aforesaid assignment to complainant by said Merchants Electric Light & Motor Company, said complainant repudiated said contract so made under the provisions contained in ordinance No. 441, and refused to furnish any of the lights to be furnished under said contract.

After the incorporation of the Merchants Electric Light & Motor Company, but before the assignment and sale of a part of its property and five-sixths interest in said franchise, an arrangement was entered into by and between the City of Joplin and

the Merchants Electric Light & Motor Company, by which the latter agreed to maintain and keep in order, without charge to the City of Joplin, one light, so erected on poles in front of Freeman's foundry in the City of Joplin as to light the Frisco railway crossing thereat in said city, in lieu of said light to be so kept and maintained on the front porch of said Freeman's foundry, and the said Merchants Electric Light & Motor Company did, for a long time, under said arrangement, maintain said light in order, free of charge to said city, and did maintain the same until the sale to complainant on the 9th day of June, 1896, but immediately after said sale the plaintiff presented a bill to the defendant City for the maintenance of said light and refused to maintain said light free of charge to the city, either on the front porch of Freeman's foundry, as required by ordinance No. 441, or on poles in front of Freeman's foundry in said city, or at any place in said city, and the complainant immediately after the said sale repudiated the provisions of said ordinance requiring the maintenance of said light and have refused to be bound by the same from the time of the said assignment up to the voting of the bonds and the building of the electric light plant of said city, and have failed and refused ever since said assignment to be bound by the provisions of said franchise relating to the maintenance of said light and have ever since said time refused to comply with any of its provisions whatever.

The defendant admits that the City of Joplin has constructed an electric plant to be owned, controlled and operated by said city, and has erected lights in the streets of said city, and is furnishing its streets and alleys with arc electric lighting; admits that said city, by its mayor, council and other

officers, had, prior to this suit, also erected poles along the streets and alleys of said city, and prior to said suit strung the same with wires, and had prior thereto purchased transformers and established a schedule of rates and prices, and was before said suit soliciting patrons and customers and had since February 23, 1900, and up to the time of the granting of the injunction herein was doing ordinary commercial lighting in said city and the additions thereto.

The defendant admits that it was entering in the ordinary manner into legitimate competition with complainant in the matter of supplying or furnishing for pay the inhabitants of defendant and its additions incandescent light or other electric lighting for their residences, places of business and like places, but denies that the defendant would thereby deprive complainant of rentals, income and profits in the matter of supplying said inhabitants aforesaid with electric lighting under the franchise granted by ordinance No. 441.

Defendant further admits that the aforesaid acts and proceedings of the said defendant and of its officers and servants in erecting its own electric light plant and in furnishing and supplying its inhabitants with incandescent or other electric lights and in otherwise entering into competition with complainant in the matter of doing ordinary commercial electric lighting in said City of Joplin and its additions, as in complainant's bill set out, have been done and purport to have been done under the authority of a two-thirds vote of the electors of said city authorizing the increase of its municipal indebtedness for the purposes of erecting said electric plant, and also under and pursuant to ordinances of

said city, duly passed by its council and approved by its mayor.

The defendant denies that complainant has a large amount of capital invested in said business of furnishing and supplying to the inhabitants of the City of Joplin and its vicinity electric lighting and electric motor power under said franchise, and defendant denies that the franchise granted by ordinance No. 441 is a valuable one, denies that complainant's property will be greatly impaired or in any manner destroyed if defendant is permitted to continue its competition with the complainant in supplying and furnishing to the inhabitants and residents of defendant said electric lighting, as above stated, and denies that complainant would be deprived of rentals, profits, incomes or sources of revenue it would otherwise receive from the citizens and inhabitants of Joplin in the business of furnishing and supplying to them electric lighting under said ordinance, and defendant admits that complainant is and at the time of bringing of this suit was the owner of a part of a town lot with a one-story building thereto, used for an office in said city, of the value of $2,000, and personal property within said city of the value of $5,000, used by complainant in doing a lighting business in defendant city, the electricity being generated at a plant at Grand Falls, in Newton county, about five miles from said City of Joplin.

The defendant denies that the acts of defendant in entering into competition with complainant in the matter of supplying and furnishing to the citizens of defendant and its vicinity electric lighting violate or set at naught, to complainant's injury or damage, the clause of the Constitution of the United States, contained in Article I, Section 10, of said instru-

ment, which provides that no state shall pass any law impairing the obligation of contracts; neither do they violate or set at naught the provisions of the Constitution of the United States, contained in Article 14, Section 1, thereof, which provides that no state shall deprive any person of property without due process of law, and defendant admits that the matter in dispute herein exceeds the sum of $2,000, exclusive of interest and costs.

On the 21st day of February, 1894, the City of Joplin entered into a contract in writing with the Southwestern Electric Light & Water Power Company, a corporation organized and existing under the laws of the State of Missouri, said corporation being composed substantially of the same stockholders that now compose the complainant company, by the terms of which contract the Southwestern Electric Light & Water Power Company agreed for a period of five years from the first day of May, 1894, to the first day of May, 1899, to be bound in the sum of $10,000 to furnish said city with as many arc lamps to light the streets of said city as the council might desire, and by resolution order from time to time; said lamps to be of full 2,000 C. P., kept and maintained at that standard, lighted at sunset and continued lighted until sunrise, at all times, at and for the price of $72 per year for each and every arc light so furnished.

The defendant City of Joplin duly complied with all and performed all the conditions of said contract on its part to be performed; that at the time of making said contract there was a mortgage or deed of trust on all the property and assets of the Southwestern Electric Light & Water Power Company for the sum of about $200,000, and on the — day of April, 1896, said mortgage was foreclosed, and

all the assets and property of said corporation were sold and conveyed away to the complainant at trustee's sale. Immediately after said sale complainant *repudiated said contract and refused to be bound by* any of its terms and refused from said — day of April, 1896, to the time of the issuing of the bonds and the building of the light plant of the said city defendant, to enter into any satisfactory contract with said city to light the streets of said city, although often requested by defendant so to do.

The defendant further states that from the time of foreclosure and sale of the assets and property of the said Southwestern Electric Light & Water Power Company in April, 1896, up to the time of the voting of the bonds of said city and the building of said city plant, the defendant city had no contract with any individual or corporation to light the streets of said city except a temporary arrangement with complainant to furnish lights to light the streets of said defendant city, and which was attended with much annoyance and inconvenience to said city and its citizens, that is to say, that the lights furnished were of a very poor quality and not nearly of 2,000 candle power; that they were subject to frequent interruptions and were only kept burning about two-thirds of the time. The defendant is informed and believes that from the time the complainant commenced business in 1896 until the vote of the bonds and the building of the plant of the defendant city there was no person or corporation in or near said city that had the capacity or facilities to adequately supply the demand for commercial and street lighting in the district in which the complainant did a lighting business.

Defendant further states that the City of Joplin and the territory contiguous and contributory to it

has and for the last four years has had a population of about 100,000 people; that it is and during all the said time has been a district engaged in mining, of which Joplin has been the center, as well as a railroad center, and there is constantly attracted to it a lorge floating population; that defendant has a population of about thirty thousand people; that for this reason and others it is necessary that the streets, alleys and public grounds should be at all times adequately lighted with reliable street lights; that on the first day of September, 1899, the complainant absolutely refused to longer furnish said city with any lights for its streets, alleys, or public grounds; that from said date until the 16th day of February, 1900, the time of the completion of said city light plant, the said streets, alleys and public grounds in said city were in darkness; that the defendant is informed and believes that all the property of complainant is, and has been ever since it was incorporated, subject to a large mortgage or deed of trust of about $150,000, and which is liable to foreclose at any time and which constitutes a prior lien to any contract the city might have made with complainant, and which foreclosure would have terminated any contract the defendant might have made with the complainant, and the defendant alleges that the complainant never, at any time prior to the building of the said electric light plant of defendant city, offered to enter into a time contract with the defendant or give security for its performance.

The defendant further alleged that it was and would be impracticable to operate the said city light plant for street lighting alone, without running the same in connection with commercial lighting; that to operate said city plant for the sole purpose of

lighting the streets, alleys and public grounds of said city, will entail an expense far greater than would be a reasonable charge for such lighting, and that the operation of said plant for said street lighting alone will result in large and unnecessary taxes levied upon the tax-payers of the city; that the city light plant can be operated in connection with commercial lighting, so that there will be no expense to the defendant city nor its tax-payers, for such operation.

A general replication was filed by the complainant.

ASSIGNMENT AND SPECIFICATION OF ERRORS.

The assignment of errors challenges the correctness of the action of the Circuit Court, upon nine grounds, all of which were duly assigned (Record, 25–26). They are as follows:

1. That by the said record aforesaid, it appears that the order, judgment and decree aforesaid was given for the complainant, Southwest Missouri Light Company, against the defendant, City of Joplin, whereas, by the law of the land the said judgment ought to have been given for the said defendant, City of Joplin, and against the said plaintiff, Southwest Missouri Light Company.

2. That the Circuit Court erred in holding that the bill of complainant, Southwest Missouri Light Company, was sufficient to state a cause of equitable relief against the defendant, City of Joplin.

3. That the Circuit Court erred in holding that the act of the Missouri legislature of 1891 (Laws of Mo., 1891, p. 60), gave to cities of the third class the right to erect, maintain and operate electric light works or to contract for their erection, maintenance and operation, in the alternative, and that such act did not confer upon said cities the right to exercise both of said powers at the same time.

4. That the Circuit Court erred in holding that the ordinance of the City of Joplin of February 7, 1899, and proceedings subsequent thereto, impaired the obligation of the contract with the complainant, contained in the ordinance of October 7, 1891, granting a franchise to the complainant's assignors.

5. That the Circuit Court erred in holding that it was an implied condition in the franchise of

October 7, 1891, to complainant's assignors, that the City of Joplin would not engage in the erection, maintenance and operation of an electric light plant for the supply of electric light to its inhabitants during the period of said franchise.

6. That the Circuit Court erred in holding that the act of the legislature (Laws of Mo., 1891, p. 60), conferred upon the City of Joplin the right to construct, maintain and operate an electric light plant for the supply of its inhabitants with electric light, or to contract for the erection, maintenance and operation of an electric light plant for the same purpose, in the alternative, but that both powers were not conferred, and at the same time, in holding that the court had jurisdiction to entertain the bill and render a decree against the defendant.

7. That the Circuit Court erred in not finding that the complainant failed in a substantial degree to comply with the terms of the franchise of October 7th, 1891, and for that reason was not entitled to the equitable relief prayed for.

8. That the Circuit Court erred in not holding that the complainant had repudiated the franchise of October 7, 1891, upon which complainant bases its claim for equitable relief, and for that reason was not entitled to the relief prayed for.

9. That the Circuit Court erred in holding that the ordinance of the City of Joplin of October 7, 1891, upon which complainant bases its claim for equitable relief was exclusive in its character and disabled the City of Joplin, defendant, from afterwards erecting, maintaining and operating an electric light plant of its own for the supply of electric light to its inhabitants.

EVIDENCE.

Ordinance 441, which is the foundation of the complainant's bill, is as follows (Rec. 1):

ORDINANCE No. 441.

An ordinance granting to John C. Cox, Jr., H. H. Gregg, J. V. Pierce, John Wise, J. W. Freeman, and Chas Ragin, doing business under the firm name and style of the Merchants' Electric Light *Light* & Motor Company, the right to erect and operate electric light and motor plants, with necessary conduits and appliances for the transmission, distribution, and application of electric light and electric motor power and regulating the same.

Be it Ordained by the Council of the City of Joplin, as follows:

SECTION 1. In consideration of the benefit to be derived therefrom, John C. Cox, Jr., H. H. Gregg, J. V. Pierce, John Wise, J. W. Freeman, and Chas.
10 & 11. Ragin, and their successors and assigns, are hereby granted the right, power, privilege and authority, within the City of Joplin and such additions as may be made thereto, to build, erect, maintain, construct and operate all necessary and convenient electric light and electric motor plants, apparatus, machinery and appliances for the generation of electricity, to provide, erect and maintain proper and adequate conduits and means for the distribution, application and use of such electricity for the purpose of furnishing light, heat, motor power, and for other proper purposes, for the period of twenty (20) years from the granting of this franchise, and for such purposes said John C. Cox, Jr., H. H. Gregg, J. V. Pierce, John Wise, J. W. Freeman and Chas. Ragin, their successors and assigns, are authorized and vested with full power to erect and maintain on, over and under the streets, avenues, alleys, lanes and public grounds of said city, poles, masts and other proper supports, and to carry, suspend and string wires thereon and therefrom, and to lay down within such streets, avenues, alleys and lanes, beneath the surface thereof, such proper pipes,

wires or conduits as may be necessary or convenient for the purpose aforesaid, and to maintain and operate, repair, and renew the same as may be necessary or convenient and to occupy the streets, avenues, alleys and lanes of said city as the same may be necessary for all the purposes aforesaid.

Provided, that the aforesaid work shall be done, and the rights hereby granted, exercised in such a manner as not to interfere with the rights or injure the property of other persons or corporations, and in every case where the surface of the streets, avenues, alleys, lanes or public ground is broken and holes or trenches dug therein, for the purpose aforesaid, they shall be repaired by said parties within twenty-four (24) hours and placed in as good a condition as before, and when

12. poles or masts are set through any sidewalks they shall be set next to the curb, and a hole of proper size carefully cut through the walk, so as not to break the same, and when set, the opening around the same shall be well filled with cement.

And provided, that all poles for lines parallel with alleys shall be erected in alleys except where necessary to cross streets, and to properly suspend street lights if contracted for by the city at any time.

SECTION 2. All poles or masts erected within the city limits shall be at least twelve (12) inches in diameter, and thirty (30) feet high from the surface of the ground, except poles carrying street lights, which shall be forty-five (45) feet high; and all wires used by the said John C. Cox, Jr., H. H. Gregg, J. V. Pierce, John Wise, J. W. Freeman and Chas. Ragin, their successors or assigns, for the purpose of conveying and transmitting the currants of electricity shall be thoroughly insulated, or of such character as is approved by the board of underwriters, and same shall not be placed or located so as to interfere with any telegraph, telephone, street car or other electric wires now erected in the City of Joplin.

And when digging in the streets, alleys or other public places for any purpose, shall keep all openings well guarded, and keep red lights thereat at night to prevent any injury

therefrom. Upon failure of the said parties to use the poles, masts and towers aforesaid, they shall remove the same, and should they fail, neglect or refuse to do so, same may be removed by the City of Joplin as any other obstruction, at the expense and cost of the said company, their successors or assigns.

SECTION 3. The said John C. Cox, Jr., H. H. Gregg, J. V. Pierce, John Wise, J. W. Freeman and Chas. Ragin, or their successors and assigns, shall not be allowed to charge for electric arc lights furnished by them more than the following sums per month, viz:

For ten o'clock circuit not to exceed the sum of eight (8) dollars per light.

For twelve o'clock circuit not to exceed the sum of ten (10) dollars per light.

For all night circuit not to exceed the sum of twelve dollars per light.

13 For incandescent lights of 16 c. p. for ten o'clock circuit not to exceed the sum of $0.90, and for all-night circuit not to exceed the sum of $1.00 per light.

For one light erected on the front porch of Freeman's foundry, so as to light the 'Frisco railroad crossing on Main street, and to be maintained and kept in order without charge or expense to the city.

SECTION 4. The said Merchants' Electric Light & Motor Co. shall protect, indemnify and save harmless the City of Joplin at all time from expense, cost and damage for injuries sustained by any person or persons, or damage to property during the construction, repair or operation of said electric light and motor plants, or either of them, and if any suit shall be commenced against said city for any injury or damage occasioned by any act or thing done by said Electric Light & Motor Company, their successors or assigns, their agents, servants or employes during the construction, repair or operation of such electric light and motor plants, then the said Merchants' Electric Light & Motor Company, their successors and assigns, shall, at their own expense, join said City of

Joplin in defense against said suits, claims and actions, as well as pay off and satisfy any judgments that may be obtained against said city in such proceedings.

SECTION 5. The said John C. Cox, Jr., H. H. Gregg, J. V. Pierce, John Wise, J. W. Freeman and Chas. Ragin, or their successors or assigns, shall within ten days from and after the date of the passage of this ordinance, file with the City Clerk of the City of Joplin, their written acceptance of the right and privileges herein granted, subject to all the conditions herein imposed and said city clerk shall report the same to the city council.

Unless said parties, their successors or assigns, shall begin work in good faith within sixty (60) days from the approval of this ordinance, and have work in operation within four months, this ordinance shall be void and of no effect. Provided the said John C. Cox, Jr., H. H. Gregg, J. V. Pierce, John Wise, J. W. Freeman and Chas. Ragin, or their assigns, do further agree to pay for the publication of this ordinance upon presentation of bill for same; and upon its refusal to pay said bill or cost of publication, then this ordinance shall be deemed null and void until the above conditions are complied with.

SECTION 6. This ordinance shall take effect and be in force from and after its publication.

Approved October 7, 1891.

R. B. TYLER, Mayor.

Atttest: J. R. KAVANAUGH, City Clerk.

The grantees of this franchise incorporated under the name of the Merchants Electric Light & Motor Company (Rec., 39) and this Company, on June 9, 1896, duly conveyed all of its propery to the Southwest Missouri Light Company, the complainant herein (Rec., 48), and the complainant has been the owner of the franchise since that date.

On February 21, 1894, the City of Joplin and the Southwest Electric Light & Water Power Com-

pany entered into a contract for five years, beginning May 1st, 1894, and ending May 1st, 1899, for the lighting of the streets of the city with arc lights (Rec., 34). It is claimed by the complainant that when it acquired its electric light plant in 1896, as above stated, it assumed the contract last named and carried it out (Rec., 77).

On May 9, 1899, the City of Joplin and the complainant entered into a contract to continue the service of lighting the city, on the basis of the five year contractfor a further period of four months (R., 37). This additional four months contract expired September 9, 1899; after the expiration of this extension for four months, no further contract was made between the city and the complainant (R., 65).

On February 7, 1899, an ordinance was passed by the City of Joplin, calling a special election for the purpose of submitting to the qualified voters of the city a proposition to increase the indebtedness of the City of Joplin for the purpose of building an electric light plant, to be owned, controlled and operated by the city, and authorizing the council and officers of the city to issue bonds therefor and to provide a sinking fund to pay the same (R., 136). An election was duly had, and on March 1, 1899, an ordinance was passed declaring the result of the special election held on February 28, 1899, for the purpose aforesaid, and that the proposition was duly carried; also providing for the issue of bonds, in the sum of $30,000, to be known as the City of Joplin Electric Light bonds (R., 137). On March 22, 1899, the city passed an ordinance providing for the appointment of a Board of Managers for the City Electric Light plant and prescribing the duties thereof (R., 138). Work was accordingly begun

upon the city's plant and it was completed in February, 1900; lamps were erected for public lighting and the streets lighted thereby and the city also began to supply citizens with commercial lights. The city's plant cost $36,000. (R., 140, 141).

As soon as the city had begun to do commercial lighting, this injunction suit was brought and a temporary injunction issued (101 Fed., 23), which, on final hearing, was made permanent.

There was also a great deal of testimony tending to show that the lights supplied by the complainant were poor and unreliable, and that the city frequently cut down its bills for street lighting (R., 170, 183). There was also abundant testimony that the lights furnished by the complainant were poor, generally throughout the city (R., 158, 168, 177, 194).

It was clearly established by the evidence that about the first of September, 1896, and about three months after complainant purchased the franchise granted by ordinance No. 441, it ceased to operate the plant built within the City of Joplin, under that ordinance for the purpose of generating electricity to supply electric lights within said city, as required by the provisions of said ordinance; and in April, 1897, it dismantled and tore down this plant and never maintained thereafter within the defendant city, or its additions, any plant to generate electricity to supply said city with electric lights (R., 97, 98, 144, 157), as required by the provisions of ordinance No. 441 (R., 1, 2, 3).

The evidence negatives any idea of an exclusive right under franchise 441. A number of electric light franchises, and one gas franchise had been previously granted; and a gas company, and an electric light company, the predecessor of complainant,

were furnishing lights under such franchises in the City of Joplin at the very time when ordinance 441, under which complainant claims, was passed; and ordinance 441 was passed to secure competition in the lighting business (R., 142, 143, 129, 130, 155).

The evidence discloses that before complainant secured control of franchise ordinance 441, the provisions of that ordinance had been substantially complied with, but as soon as complainant became the owner of that franchise, by assignment, it repudiated the franchise granted by that ordinance and refused to act under it or be bound by its terms. Geo. T. Bayne, the superintendent of complainant for the two years immediately after said assignment, testified substantially as follows:

That complainant before and at the time that complainant became the assignee of ordinance 441, had been and was operating under a franchise known as the Sergeant franchise (R., 129, 130), which was a better and more liberal franchise for the company than ordinance 441.

That this Sergeant franchise did not require the company to maintain any free lights. For this reason he had elected to act under the Sergeant franchise and had refused to maintain this light under ordinance 441, when the city officials had demanded that he do so (R., 183 to 186). See also R., 193, 195, 167.

BRIEF.

I.

Ordinance 441 granted no exclusive right to the complainant.

The franchise granted in ordinance 441 was not exclusive nor does it contain any obligation on the part of the municipality not to compete with the owner of the franchise in commercial lighting or otherwise; nor is the use of the streets granted by the franchise an exclusive one.

The ordinance by its terms grants to the persons therein named the right and authority to erect and maintain electric light plants, etc., and power to place the poles and wires in the streets of the City of Joplin. The only obligation or duty created by this ordinance on the part of the city is to permit the erection of such electric light plant and the use of the streets for that purpose.

On the other hand, the grantees of the franchise assumed the following obligations:

(*a*) The plant is to be erected in the City of Joplin and additions thereto.

(*b*) The work done under the ordinance shall not injure the property of other persons or corporations, and the surface of the ground when disturbed shall be replaced, and poles or masts shall only be set through the sidewalk in a certain specified manner.

(*c*) Poles for lines parallel with alleys shall be erected in the alleys and the poles shall be of a certain size, a specified height, and the wires shall be insulated and shall not be placed so as to interfere with other wires carrying electric currents.

(*d*) When digging in the streets, alleys or

other public places, the grantees shall use certain precautions.

(*e*) The charge to be made for arc lights and incandescent lights shall not exceed a certain sum, and one light shall be maintained on the front porch of Freeman's foundry without expense to the city.

(*f*) The grantees shall indemnify and save harmless the city from loss or damage caused by the maintenance and operation of such plant.

(*g*) The grantees shall accept the ordinance in writing, and shall begin work within sixty days from the time of the passage of the ordinance and shall have the work in operation within four months thereafter, and also pay for the cost of publishing the ordinance.

The gravamen of complainant's bill is an impairment of the obligation imposed by the foregoing ordinance in its favor.

In examining the ordinance, we look in vain for any restriction upon the right of the city to grant other or similar franchises to other persons for the construction and operation of electric light plants; or to construct and operate an electric light plant itself for the purpose of supplying its citizens with light.

While it may be assumed, for the purpose of the argument, that there had been a contract between the city and the complainant, made subsequent to the granting of the franchise, by the terms of which the complainant was to furnish electric lighting to the city, yet at the time the city undertook the construction of its own plant, and at the time of the filing of this action, no contract existed between the parties. The ordinance created, neither directly nor indirectly, any obligation whatever upon the

city to contract with Electric Light Company for its lights. The ordinance amounts to a license to the complainant to use the city's streets, and that is all.

Had it been the intention of the parties to grant an exclusive franchise, or had the parties intended that the city should thereafter be disabled from erecting and maintaining an electric light plant in competition with the complainant, it would have been easy to have inserted in the ordinance words of restriction or limitation. The fact that we do not find them there, not only points to the conclusion as a matter of law that the contract did not grant an exclusive right to the complainant, but indicates that it was the intention of the parties that no such exclusive right should be granted or enjoyed.

II.

As the City of Joplin, by ordinance 441, did not expressly grant an exclusive franchise or expressly disable itself from erecting and maintaining an electric light plant, no such restrictions will be created by implication.

He who claims the grant of an exclusive franchise from a municipality must be able to point out the express terms by which the exclusive grant is created. The rights of the city and its citizens do not pass by uncertain or ambiguous language or by implication. Where a municipality is vested with certain powers, the law jealously guards their exercise and construes contracts of the nature now under consideration most favorable to the municipality.

The case of *Bienville Water Company* v. *City of Mobile,* 95 Fed., 539, was somewhat similar to the case at bar. It there appeared that on August

15, 1888, the complainant entered into a contract with the City of Mobile by which it agreed and contracted to furnish, for the use of the city, 260 fire hydrants, and to furnish water for fire service of a certain number of streams and pressure, and it further agreed that the city should have the unrestricted use of the hydrants for fire purposes. The complainant was authorized to construct all needed canals, ditches, etc., and agreed not to charge, during the continuance of the contract, for domestic use a greater or higher rate for water than that named or specified in the contract.

The bill averred that the complainant had complied with all of the obligations of the contract on its part, but that the City of Mobile was proceeding to violate its contract, in that on May 14, 1898, during the continuance of the said contract, it had bought and taken possession of the water works plant and was operating the same, selling water to customers and cutting rates below those fixed in the contract and actually competing in the business of selling and furnishing water to its inhabitants, thereby decreasing the complainant's income. The bill also averred that the defendant was building another system of water works to supply itself and its inhabitants with water. The city's charter provided that it had the right to contract for, build, purchase or otherwise acquire public works subject to the approval of a majority vote of the citizens at a special election called therefor. The city proceeded to hold an election and issued bonds and entered into the construction of a water works system and an action was brought for an injunction on the ground that the obligation of the complainant's contract with the city was being impaired.

The court denied an injunction, and, after citing authorities, said:

> "Thus we have seen that the contract in every case to which our attention has been called, either provided for an exclusive right in the water company to supply water to the city and its inhabitants, granted or contracted for by the city, or contained a covenant by the city that it would not erect water works of its own and would abstain from granting the right to do so to a competing company during the life of the contract. We have seen that the contract under consideration in this case contains no such stipulation or agreement. We have seen that it does not attempt to grant any exclusive right to the complainant, and that it contains no provision that the complainant shall furnish water to the inhabitants of the City of Mobile, and no covenant by the city that it will not build or acquire water works of its own or abstain from supplying water to its inhabitants during the continuance of the contract. The parties might have made such a contract, but they did not do so. My conclusion then, is that the complainant has shown no legal grounds on which to grant it, the injunction prayed for in the bill."

The foregoing case was appealed to this court and is reported in 20 Sup. Ct. Rep., p. 40. The judgment of the lower court was affirmed, this court using the following language:

> "The charter provided that the city might contract for, build, purchase, or otherwise acquire public works subject to the approval of a majority vote of the citizens of Mobile at a special election called therefor; and in July, 1897, such an election was held, and a majority of the votes cast were in favor of the city contracting for or otherwise acquiring water works to be owned and operated by the city, and the issuing of bonds to pay for the same. The act of November 30, 1898, authorized the issuing of bonds for that purpose. It was further averred

that acting under and by virtue of the power granted by the charter, and the act of November 30, the city had entered into a contract to have a system of water works built, and that the building of the same was now going on, and that it had made a contract with certain persons to take said bonds, who had already taken and paid for a part of them. Complainant contended that the city had no legal right to impair the value of its plant and to destroy or diminish its income therefrom, which would be the effect of the city's action in building water works and furnishing water to its inhabitants, and it was averred that defendant was insolvent, and that the only way complainant could protect itself was through the interposition of a court of equity. It was not asserted by complainant that it had been granted an exclusive franchise to furnish water to the city and its inhabitants, but that under the contracts the city had no right to furnish water to other persons, or to build or acquire a system of water works to supply water to itself and its inhabitants, and that to do this was a violation thereof.

"The circuit court observed that the city of Mobile granted complainant no rights or privileges whatever, but that the legislature of the state granted it the right to build waterworks and to use the streets of the city for water purposes, and authorized complainant and the city to contract together for the purpose of supplying the city with water. The contract was made, but there was no express provision in it for furnishing the inhabitants with water, and no stipulation by complainant that it would do so, though it was clear that the parties contemplated that complainant would contract with the inhabitants to supply them with water for domestic purposes, since it was stipulated that complainant should not charge for water so supplied higher rates than those specified therein. On the other hand, the city was authorized and empowered by its charter and the act of the legislature of November 30, 1898, to build or otherwise acquire waterworks of its own to supply water to itself and its inhabitants for the extinguishment of fires and

for sanitary and domestic purposes, and the city in its contract with complainant did not agree not to do so. It did agree to pay complainant for a certain number of hydrants erected and supplied by it, and to make the payments monthly, but there was no averment that the city had by act or word repudiated its obligations, or failed or refused to make the payments stipulated for, or that it intended to do so.

"In short, there were no facts averred showing that the city had violated, was violating, or intended to violate, its contracts with complainant, and there was no legislation to that end. Such being the state of the case, the circuit court did not err in dismissing the bill and, as there was color for the motion to dismiss, the motion to affirm will be sustained. Decree affirmed."

The case of *Skaneateles Water Works Co.* v. *Village of Skaneateles*, 22 Sup. Ct. Rep. 400, is very similar in its facts to the case at bar. There, the village granted a franchise to the Water Works Company to maintain and operate within the village of Skaneateles a system of waterworks for furnishing the citizens of the village pure and wholesome water upon the terms and conditions stated in the franchise. The water company constructed its plant under this franchise and completed it about the year 1889, and put it in operation. The system was a complete and adequate one, no complaint having been made that the water furnished was not pure and wholesome, or that it had been inadequate for the purpose for which the system was erected.

On February 1, 1891, the Water company and the village entered into a contract for the supply of water and the erection of hydrants and for the payment of certain compensation therefor by the village. The contract was limited by its terms to the period of five years from February 1, 1891, and had

not been renewed since the time of its expiration, on February 1, 1896. After the latter date, without any proceedings to annul the franchise, the village proceeded to vote bonds for the erection of a water plant of its own and thereupon the Water Company brought an injunction against the village, claiming that the obligation of its contract was being impaired. This court held that the Water Company was not entitled to relief, and affirmed the decree of the Court of Appeals of New York, which had reached the same conclusion.

It was claimed in that case, as in the case at bar, that inasmuch as the village had two methods for obtaining a supply of water, by the erection of a plant itself or by contracting with a water company for a supply, and chose the latter method, "it impliedly contracted that it would not itself thereafter take the other method for obtaining such supply." The court said:

> "It would seem to be clear, under the decisions of this court, that the plaintiff in applying to the village and filing its certificate with the Secretary of State, under the act of 1873, acquired no contract right, expressed or implied, to any exclusive privilege of using the streets of the village for supplying it with water. * * * Indeed, this proposition is conceded by council for plaintiff, and it admits that the village, notwithstanding its grant to the plaintiff, possessed the power to grant to any other individual company the same kind of privilege it had already granted to plaintiff. But it denies the right of the village to avail itself of the authority to itself build and operate the works, given under the act of 1875, unless the plaintiff's plant be taken by purchase or condemnation."

Bearing in mind that the only right secured by the complainant in the case at bar was to erect its

poles and string its wires in the streets and alleys of the City of Joplin, and that at the time of the institution of this action there were no contract rights whatever between the city and the complainant, except ordinance 441, the following language is peculiarly applicable:

> "By virtue of its incorporation under this act of 1875, the plaintiff secured simply the right to be a corporation, and the authority to lay its water pipes in any of the streets and avenues or public streets of the village of Skaneateles. The village, however, as stated, was under no obligation to take water from the company. That was a matter for a subsequent contract between the parties. Admitting that in every grant there is an implication that the grantor will do nothing to detract from the full and complete operation of the grant itself, we cannot find any implication that after the termination of the contract the plaintiff and defendant were empowered to make, there should be no right in the defendant to build its own system of water works under the statute of 1875, unless it purchased or condemned the property of the complainant.
>
> "There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of the municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

In the recent case of *Freeport Water Co.* v. *City of Freeport,* 21 Sup. Ct. Rep., 493, it is held:

> "The power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers it is not enough that the power is convenient to other powers; it must be indispensable to them."

In *Pearsall* v. *Railway Co.*, 161 U. S., 664, it is said:

> "Hence an exclusive right to enjoy a certain franchise is never presumed, and unless the charter contains words of exclusion it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principal was laid down at an early day in the case of *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420, and has been steadily adhered to ever since."

The jurisdiction of this action is entirely dependent upon the averment in the bill that the obligation of the complainant's contract as contained in its franchise has been impaired. If jurisdiction fails upon this ground, it must fail entirely, since both complainant and defendant are residents of the State of Missouri. It is perfectly plain that if the complainant would enjoy, after the erection and operation by the City of Joplin of its electric light plant all of the rights secured to it under its franchise, then there has been no impairment of its contract. If we turn to the franchise itself, we submit that it is impossible to point to a single right or obligation secured to the complainant which it would not fully and freely enjoy if the city were today operating its electric light plant and lighting its own streets and furnishing electric lighting to its own citizens.

In *St. Paul Gas Light Co.* v. *City of St. Paul*, 21 Sup. Ct. Rep., 575, it appeared that the City of St. Paul had made a contract with the gas company, whereby the latter was to erect certain gas lights and the city was to pay a certain price for each lamp so erected by way of monthly compensation. The gas company afterwards, in certain portions of the city, used electric lights instead of gas lamps. The city council passed an ordinance requiring the gas

company to take up its gas lamps and remove the same, and declaring that no further payment should be made on account of the gas lamps. The gas company brought suit, alleging that the ordinance impaired the validity of its contract with the city to receive compensation in respect of such gas lamps, which were not in use. It was held that there had been no impairment of the contract, the court using this language:

> "Referring to the ordinance in question, from the provisions of which it is alone contended the impairment of the contract arose, it will be seen that only two subjects are therein referred to; the first, a command by the city to the gas company to 'forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works;' and, second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed. If, then, there be any subsequent legislation impairing the obligation of the contract, it must arise from one or both of the provisions just referred to. Now, it is apparent that the command given by the city to the gas company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation remained wholly untouched by the order of removal. This being true, it results that the order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such

obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment. And it will become at once manifest, from a consideration of the remaining provision of the ordinance, that the same result must follow. The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on the cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, while embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus, to reduce the proposition to its ultimate conception is to demonstrate its error."

The disposition of the courts to construe franchises of a character similar to that under consideration in favor of the city and to hold that nothing passed by implication, and only such rights are con-

ferred as are contained in express language of the grant itself, is well illustrated in the case of *Stein* v. *Water Co.*, 141 U. S., 67. It is there held:

> "A contract with a municipal corporation whereby the corporation grants to the contractor the sole privilege of supplying the municipality with water from a distinct source for a term of years is not impaired, within the meaning of the contract clause of the constitution, by a grant to another party of a privilege to supply water from a different source.
>
> "Where a contract with a municipal corporation is susceptible of two meanings, one restricting and the other expanding the powers of the corporation, that construction is to be adopted which works the least harm to the state."

This court, after discussing the cases of *New Orleans Water Works Co.* v. *Rivers,* 115 U. S., 674, and *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S., 64, said:

> "The present case is materially different. The exclusive right acquired by Stein under his contract of 1840 with the City of Mobile, and confirmed by the act of January 17th, 1841, of supplying that city and its people with water, by means of a system of public works, did not, in terms or by necessary implication, embrace all streams, or rivers, or bodies of water from which he could supply water for public use in Mobile. While the obtaining of water for that city was undoubtedly contemplated by the legislature, when it passed the first act, that of 1820, the thing done to that end was to incorporate three persons proposing to bring water to the city from Three-Mile creek. And this idea was apparent in the agreement of 1836 with Hitchcock. So, by the agreement with Stein, he and his heirs, administrators and assigns, acquired the sole privilege of supplying the City of Mobile with water from Three-Mile creek, for a designated term of years, as well as after the expiration of that

term, and until he or they should receive from the city the actual value of his water works, determined in the mode prescribed by the contract. The specific power and authority given to Stein and his executors, administrators and assigns, by the city and the state, was to conduct the water from any part of the Three-Mile creek, so-called, so that the same be good and wholesome. Why the parties, in making their agreement, specified a particular stream from which Stein was to conduct water to the City of Mobile, for public use, does not distinctly appear. And it is not necessary to inquire, for the question before us depends upon a fair and reasonable interpretation of the agreement actually made. The court has no right to enlarge it, even if we believe that the parties themselves would have done so if the matter had at the time the agreement was signed, been called to their attention. The exclusive privilege granted and the power and authority conferred, in connection therewith, were to conduct water into the city from Three-Mile creek. The parties, by the agreement, fixed upon that stream as a source of the water to be brought into the city, and the exclusive privilege granted to Stein had reference only to that stream.

"The case, then, is this, the state incorporated the Bienville Water Supply Co., and conferred upon it the exclusive right, for a term of years, to supply the Fort of Mobile with water conducted and brought from any other point than Three-Mile creek. The plaintiff seeks a perpetual injunction against the exercise of that right, and in support of his claim of an exclusive privilege of supplying water for Mobile and its people, from whatever source drawn, exhibits the contract which granted to Stein the exclusive right to supply that city and people with water brought from Three-Mile creek, for a fixed term of years, and until his works were redeemed by the city."

After stating the rule of interpretation of the granting of franchises, heretofore quoted, the court concludes as follows:

> "Guided by this rule, in respect to which there is no difference of opinion in the courts of this country, we are forbidden to hold that a grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river."

A similar ruling is made in *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 536. There the following rule was announced:

> "The charter of a bridge corporation, not containing an express contract that the State would not authorize another bridge to be built to the injury of the corporation, held, that no such contract could be implied, and that a law empowering another corporation to erect and maintain a free bridge so near to the first as practically to deprive the first corporation of all tolls, was not a law impairing the obligation of any contract."

The court, after stating the rule that nothing is to be taken by intendment or implication, said:

> "Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River Bridge. This act of incorporation is in usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building a bridge; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given them over the waters of

Charles River, above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may dimish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used, from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply from the nature of the grant; and cannot be inferred from the words by which the grant is made. * * * But its income is destroyed by the Warren bridge, which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. * * * The inquiry then is, does the charter contain such a contract on the part of the State? Is there any such stipulation to be be found in that instrument? It must be admitted on all hands that there is none,—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied."

In *Hamilton Gaslight Co.* v. *Hamilton City*, 146 U. S., 258; the statute under consideration gave to the city council the power either to erect gas works or to purchase such works already erected. It was proposed there, as in the case at bar, to erect

gas works by the city, at the public expense, after a franchise had been granted to the private corporation, and it was maintained there, as here, that the obligation of the contract would be impaired. The court said:

> "And it may be that the erection and maintenance of gas works by the city at the public expense and in competition with the plaintiff will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. As said by this court, in *Curtis* v. *Whitney*, 13 Wall., 68–70: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation.' If parties wish to guard against contingencies of that kind, they must do so by such clear and explicit language as will take their contracts out of the established rule, that public grants, susceptible of two constructions, must recieve the one most favorable to the public. Upon this ground it was held in *Stien* v. *Bienville Water Supply Co.*, 141 U. S., 67, 81, that 'we are forbidden to hold that a grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of waterworks from a particular stream or river, prevents the state from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river.' What was said in *Turnpike Company* v. *The State*, 3 Wall., 210, 213, is quite applicable to the present case. The State of Maryland incorporated a company with power to construct a turnpike between Baltimore and Washington; and subsequently incorporated a railroad company, with authority to construct a railroad between the same cities, the line

of which ran near to and parallel with the turnpike. One of the questions in the case was, whether the last act impaired the obligation of the contract with the turnpike company, it appearing that the construction of the railroad had rendered it impracticable for the company, out of its diminished income, to maintain the turnpike in proper order. This court said: 'The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defense, is, that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms, or by necessary implication; and hence whatever may have been the general injurious effects and consequences to the company from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress. So, it may be said, in the present case, neither in the statutes under which the plaintiff became a corporation, nor in any contract it had with the city, after January 1st, 1889, was there any provision that prevented the State from giving the city authority to erect and maintain gasworks at its own expense, or that prevented the city from executing the power granted by the section of the Code of 1869 to which we have referred."

The citation of authorities of a similar import might be multiplied but we do not think it would serve any useful purpose, and we content ourselves by referring to the following cases:

Thompson Electric Co. v. *City of Newton*, 42 Fed., 723;

Lewis v. *City*, 75 Fed., 884;

City of Brooklyn, 143 N. Y., 596;

City of Austin v. *Bartholamew*, 107 Fed., 349;

Newburyport Water Co. v. *Newburyport*, 103 Fed., 587.

III.

The power of the City of Joplin to erect and operate its own electric light plant and the power to grant to some person or corporation a franchise therefor are concurrent powers. The lower court erred in holding that the city in granting a franchise for the erection of an electric light plant thereby disabled itself from erecting and maintaining one of its own.

There were two statutory provisions in force governing cities of the third class, such as the City of Joplin, in respect of the construction of electric light works and the granting of franchises therefor at the time of the passage of ordinance No. 441, granting the franchise under which the complainant claims. An act entitled, "An act to amend Article 1, of Chapter 31, of the Revised Statutes, 1889, of Missouri, entitled, 'Cities and Towns, Miscellaneous Provisions and General Powers,' by adding a new section thereto, to be numbered 1946a," was approved March 27, 1891, contained an emergency clause putting the act into effect on that date. It is as follows:

> "SECTION 1. That Article 1, of Chapter 31, of the Revised Statutes, 1889, of Missouri, entitled 'Cities and Towns, Miscellaneous Provisions and General Powers,' be and the same is hereby amended by adding a new section thereto, to be known as section 1946a, as follows:
>
> "SECTION 1946a. The city council of any city, town or village in this state shall have the power to erect, maintain and operate water works, or to acquire waterworks by purchase, and to operate and maintain the same, and to supply the inhabitants thereof with water; to erect, maintain and operate gas plants, electric light plants, or any other kind of plant or device for lighting purposes, or to acquire and own the same by purchase,

and to maintain and operate such plants, and to supply the inhabitants of such cities, towns and villages with light therefrom.

"SEC. 2. The fact that many cities and towns in this state are now without the power to erect, maintain and operate plants for furnishing the water and light necessary to the health and safety of the inhabitants thereof, creates an emergency within the meaning of the constitution; therefore, this act shall take effect and be in force from and after its passage." (Laws of 1891, p. 67).

Another act governing cities of the third class, approved April 2d, 1891, containing an emergency clause putting the law into effect on that date is as follows, so far as this controversy is concerned (Laws 1891, p. 60):

"Section 1519. The council shall have the right to erect, maintain and operate gas works, electric light works or light works of any other kind or name, and to erect lamp posts, electric light poles or any other machinery or appliances necessary to light the streets, avenues, alleys and other public places, and to supply private lights for the use of the inhabitants of the city and its suburbs, and regulate the same, and to prescribe and regulate the rates to be paid by the consumers thereof, and to acquire, by purchase, donation or condemnation, suitable ground within or without the city upon which to erect such works, and the right of way to and from said works, and also the right of way for laying gas pipes, electric wires under or above ground, and erecting posts and poles and such other machinery and appliances as may be necessary for the efficient operation of such works; all of which shall be done in the manner prescribed by ordinance: *Provided*, that the council may, in their discretion, grant the right to any person or persons or corporation to erect such works and lay the pipes, wires, and erect the posts, poles and other necessary appliances and

machinery therefor, upon such terms as may be prescribed by ordinance: *Provided, further*, that such right to such persons or corporation shall not extend for a longer period than twenty years, and shall not be renewed unless by the consent of a majority of the qualified voters of said city voting at an election held for such purpose."

It was insisted in the court below by the complainant that the power granted in Section 1519 could only operate in the alternative; that is, that the city might erect electric light works of its own or it might grant a franchise to some corporation for the erection of an electric light plant and the supply of electric light to the city and its inhabitants, but that the operation of one power operated to exclude the other, and when the city elected, in 1891, to grant a franchise by ordinance No. 441, the city was thereby disabled from erecting its own electric light plant until the expiration of the twenty years, for which time the franchise was given. The position of complainant seems to be that the right of the city to erect its own works is held in abeyance or in nubibus so long as a franchise exists granting the right to some corporation, but that upon the expiration of the franchise, then the right revives in the city to erect and maintain its own plant.

The act above quoted, approved March 27, 1891, was in force at the time section 1519 above quoted was passed. By it the city council is given the power "to erect, maintain and operate gas plants, electric light plants or any other kind of a plant or device for lighting purposes, or to acquire or own the same by purchase, and to maintain and operate such plants and to supply the inhabitants of such

cities, towns and villages with light therefrom. "We think it must be conceded that that section gave to the City of Joplin, on March 27, 1891, full and express power to erect and operate its own electric light plant. There is certainly nothing in the language in the act approved, and effective six days later, of April 2nd, 1891, evidencing any intention to repeal this act. Both of them are consistent and harmonious. The act of April 2d, 1891, should be construed most favorably to the municipality and to its citizens. The obvious purpose of it was to grant to cities of the third class two methods by which a city and its citizens might be supplied with electric light, either by the erection of electric light plant by the city or by the grant of a franchise for that purpose to some corporation or by both. There are no words of exclusion in the act and it would be a strained construction to hold that the act approved April 2d, 1891, operated by force of its terms to repeal the act approved March 27th, 1891. We submit that under either act the city has full and plenary power for the construction of its own electric light plant, notwithstanding the franchise owned by the complainant.

A case almost identical with the case at bar is the case of *Skaneateles Water Works Company* v. *Skaneateles*, 22 Sup. Rep., 400.

In 1887, the Village of Skaneateles granted complainant in that case a franchise to supply the village with water. At the time of granting such franchise, the village under the laws of New York of 1873, had the right to grant such franchise, and under the act of 1875, had the right to construct works of its own.

It was contended by complainant in that case, as by complainant in the case at bar, that, "Where

with these two different methods for obtaining a supply of water, the village chose that which called for a supply by a private company, it impliedly contracted that it would not itself take the other method of obtaining such supply, unless it bought the plant of the company, or condemned it under the provisions of the act of 1875."

The court held, that the village could construct its own works without purchasing or condemning the plant of complainant company.

IV.

If the City of Joplin in granting complainant's franchise thereby disabled itself from erecting an electric light plant of its own, then the lower court was without jurisdiction and should have dismissed the bill.

As both complainant and defendant are residents of the same state, the jurisdiction of the Federal Court is invoked solely upon the ground that complainant's contract has been impaired by the municipal ordinances of the City of Joplin, providing for the issue of bonds and erection of electric light plant. If it be true, as claimed by the complainant, in the court below, that the City of Joplin has the right to erect its own electric light plant or to contract with some other person or corporation to erect one and that this power exists and can only be exercised in the alternative and that the city has exercised its alternative right by granting the franchise to the complainant, then it necessarily results that the jurisdiction of this court must fail. The ordinances providing for the erection of a city plant would not have been passed under any supposed legislative authority, and hence could not be regarded as law, within the meaning of the constitutional pro-

hibition of state laws impairing the obligation of contracts.

The exact question was passed upon in *Hamilton Gaslight Co.* v. *City of Hamilton*, 146 U. S., 258. In that case the statutes in the State of Ohio gave to theCity of Hamilton, as in the case at bar, the power to erect a gas plant or to contract for the erection of a gas plant and the lighting of its streets and public places. In passing upon that phase of the case, this court said:

> "The plaintiff's first contention is that there is no statute of Ohio authorizing any city in which there are already gas works in full and complete operation to erect gas works or to levy a tax for that purpose. If this were conceded, we should feel obliged—the plaintiff and defendant being both corporations of Ohio—to reverse the judgment and remand the cause, with directions to dismiss the suit for want of jurisdiction in the Circuit court. The jurisdiction of that court can be sustained only upon the theory that the suit is one authorized under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff really sought protection against the violation of the alleged contract by an ordinance to which the State has not in any form given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the State within the meaning of the constitutional prohibition against State laws impairing the obligation of contracts. *Murray* v. *Charleston*, 96 U. S., 432; *Williams* v. *Bruffy* 96 U. S., 176; *Lehigh Water Co* v. *Gaston*, 121 U. S., 388; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S., 18. A suit to prevent the enforcement of such an ordinance would not therefore be one arising under the Constitution of the United States. We sustain the jurisdiction of the Circuit Court, because it appears that the defendant grounded its right to enact the ordinance in question and to

maintain and erect gas works of its own upon that section of the municipal Code of Ohio adopted in 1869, providing that the city council of any city or village should have power whenever it was deemed expedient and for the public good, to erect gas works at the expense of the corporation or to purchase gas works already erected therein; which section, as plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the state and city."

The court then quotes from the case of *State* v. *Hamilton,* 47 Ohio St., 52, where it is said:

"Section 2486, in plain language, gives the power to the council either to erect gas works or to purchase such works already erected. The authority granted is not coupled with any conditions or contingency, but is to be exercised when the council may deem it expedient and for the public good. The language is free from ambiguity. The discretionary power would hardly seem consistent with the limitations sought to be imposed, that the council can build gas works only where there are no gas works in the municipality or where gas companies already organized refuse or neglect to comply with the requirements of the law as to lighting or laying pipes or neglect to furnish gas to citizens. The interest of the city may demand that a gas company established and doing business, although complying with all statutes and ordinances, should not continue to enjoy exclusive possession of the field of operation."

In conclusion we respectfully suggest: that the claims of complainant, viewed in the light of the testimony, are not nearly so favorable as the claims of the complainants in the cases above cited whose prayers for injunctive relief were denied.

Indeed, complainant's bill itself fails to allege a substantial compliance on its part with the provisions of ordinance 441, after complainant became the

assignee of that ordinance. The bill does allege such compliance by the company which preceded it, to-wit: the Merchants Electric Light & Motor Company, but it nowhere alleges such compliance by complainant. The bill does allege that complainant, at all times since it acquired ordinance No. 441, has operated under it, and furnished lights under it, but it does not allege a compliance with its terms since it acquired it on June 9th, 1896.

Following this failure of complainant to allege any substantial compliance with the provisions of ordinance 441, comes the proof that complainant has repudiated that ordinance and refused to be bound by it.

Instead of maintaining a plant within the city as required by ordinance 441. complainant's plant for generating electricity is located out of the city, at Grand Falls, several miles from the City of Joplin, and in another county. Instead of having its plant located in the city, subject to be taxed by the municipal authorities, as was clearly contemplated by the parties when the franchise was granted, its plant is taxed by, and such taxes are used to build up a competing and rival community.

Even if complainant could extend the contract by implication so as to have the benefit of provisions not written therein, a thing not possible under the decisions of this court, still, good faith would require on the part of complainant, a compliance with such things as are plainly written therein.

Is it not reasonable to suppose that in every instance where cities intended to be bound by contracts not to engage in a certain business, they have done so in express terms? Is it not unreasonable to suppose that any grantee of a franchise would con-

sent to leave to implication a contract that the city would not engage in a like business during the life of a franchise, or for a period of years short of that time, when there was a mutual agreement not to do so.

Does not complainant then ask the enforcement of an assumed contract not expressed in the franchise, not contemplated by the parties, when the franchise was granted, upon which the minds of the parties did not meet, and which would have been guarded against had it been supposed that any such contract would be claimed?

Would not such an implied contract be at variance with the general law governing the construction of contracts? With the doctrine that public grants susceptible of two constructions, must receive the one most favorable to the public, that nothing is taken by implication, and are not the contentions of complainant at variance with all the decisions of this court?

The decree of the court below should be reversed, and complainant's bill dismissed.

Respectfully submitted,

C. H. MONTGOMERY,
SAMUEL W. MOORE,
Solicitors for Appellant.